

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TWO GUYS, INC., a Washington
Corporation, a.k.a. FRANCHISE INFUSION,
INC.,

Plaintiff,

v.

NICK-N-WILLY'S FRANCHISE
COMPANY, LLC, a Colorado limited
liability company; and RICHARD WEIL, a
Colorado resident,

Defendants.

No.:

NOTICE OF REMOVAL OF CIVIL
ACTION PURSUANT TO 28 U.S.C. § 1441

TO: CLERK OF COURT
AND TO: Plaintiff
AND TO: Robert D. Mitchelson, attorney for plaintiff

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant
Richard Weil hereby removes the Clark County Superior Court action described below to the
United States District Court for the Western District of Washington at Seattle. In support
thereof, Defendant states as follows:

///

///

NOTICE OF REMOVAL OF CIVIL ACTION
PURSUANT TO 28 U.S.C. § 1441

Page 1

Bullivant|Houser|Bailey PC

300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351

1 1. Plaintiff Two Guys, Inc., aka Franchise Infusion, Inc. ("Two Guys") filed a
2 civil action in Clark County Superior Court entitled *Two Guys, Inc. v. Nick-n-Willy's*
3 *Franchise Co., LLC, et al.*, Clark County Cause No. 11-2-01246-1 on March 25, 2011.

4 2. The action referred to above is a civil action for money damages.

5 3. The action is one in which the United States District Court is given original
6 jurisdiction by reason of diversity of citizenship and the requisite amount in controversy
7 pursuant to 28 U.S.C. § 1332(a)(1).

8 4. Defendant Richard Weil has not been formally served with the summons or
9 complaint in this matter. Accordingly, this notice of removal is timely pursuant to *Murphy*
10 *Bros. Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) and *Myer v. Nitetrain*
11 *Coach Co., Inc.*, 459 F. Supp. 2d 1074, (W.D. Wash. 2006) ("The 30-day period begins to
12 run when a party receives formal service of process.").

13 5. The process and pleadings served upon Defendant Nick-n-Willy's to date
14 include the Summons and the Complaint for Recision [sic], Damages and Attorney's Fees
15 ("Complaint"). True copies of these pleadings are attached hereto and by this reference
16 incorporated herein.

17 6. The prayer of Plaintiff's Complaint does not specify the dollar damages
18 sought. Nevertheless, Defendant Richard Weil has a good faith belief that Plaintiff seeks
19 damages in excess of \$75,000, exclusive of interest and costs, based on the other allegations
20 of the Complaint, because the Complaint seeks—among other things—a refund of
21 "approximately \$180,000" in purchase money allegedly paid as consideration in connection
22 with a development deal. (Complaint, ¶¶ 3.1, 3.3.)

23 7. This action is between citizens of different states. Plaintiff is a Washington
24 corporation. Defendant Nick-n-Willy's is a Colorado limited liability company, and
25 Defendant Richard Weil is a Colorado resident. Thus, this Court has diversity jurisdiction.

26 ///

10. By filing this Notice of Removal, Defendant does not waive, and it expressly reserves all rights, defenses, or objections of any nature that it may have to Plaintiffs' claims.

13451727.1

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2011, I caused to be served the following:
NOTICE OF REMOVAL OF CIVIL ACTION PURSUANT TO 28 U.S.C. § 1441
CIVIL COVER SHEET
CONSENT TO NOTICE OF REMOVAL OF ACTION
NOTICE OF REMOVAL TO FEDERAL COURT BY DEFENDANT
RICHARD WEIL

on the following party at the following address:

Robert D. Mitchelson
PO Box 87096
Vancouver, WA 98687-0096

Attorney for Plaintiff

by:

<input checked="checked" type="checkbox"/>	U.S. Postal Service, ordinary first class mail
<input type="checkbox"/>	U.S. Postal Service, certified or registered mail,
<input type="checkbox"/>	return receipt requested
<input type="checkbox"/>	hand delivery
<input type="checkbox"/>	other (specify) _____

/s/ Richard J. Whittemore
Richard J. Whittemore, WSBA #32713

Attorney for Defendants

COPY
ORIGINAL FILED

MAR 25 2011

Scott G. Weber, Clerk, Clark Co

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

TWO GUYS INC., a Washington Corporation,
aka FRANCHISE INFUSION, INC.

Plaintiffs,

vs.

NICK-n-WILLY'S FRANCHISE COMPANY, LLC,
and RICHARD WEIL,

Defendants.

NO. 11 2 01246 1
SUMMONS

TO THE DEFENDANT:

Nick-n-Willy's Franchise Co. LLC

A lawsuit has been started against you in the above-entitled court by TWO GUYS INC., a Washington Corporation, aka FRANCHISE INFUSION, INC., Plaintiff. Plaintiff's claim is stated in the written Complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and serve a copy upon the undersigned Attorney for the Plaintiff within 20 days after the service of this Summons, and within 60 days after service of this Summons if served upon you without this state, excluding the date of service, or a Default Judgment may be entered against you without notice. A Default Judgment is one where Plaintiff is entitled to what he asks for because you have not responded. If you serve a Notice of Appearance on the undersigned attorney, you are entitled to notice before a Default Judgment may be entered.

1 You should also file your Notice of Appearance with the clerk of the
2 Superior Court whose address is:

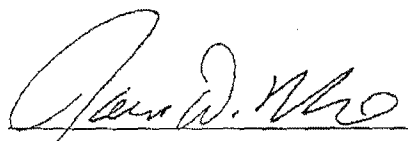
3
4 Clark County Superior Court
5 1200 Franklin St.
6 Vancouver, WA 98661
7
8

9 You may demand that the Plaintiff file this lawsuit with the Court. If you
10 do so, the demand must be in writing and must be served upon the Plaintiff.
11 Within 14 days after you serve the demand, the Plaintiff must file this lawsuit
12 with the Court, or the service on you of this Summons and Complaint will be
13 void.
14

15 If you wish to seek the advice of an attorney in this matter, you should do
16 so promptly so that your written response, if any, may be served on time.
17

18 This Summons is issued pursuant to Rule 4 of the Superior Court Civil
19 Rules of the State of Washington.
20

21
22 Dated this 15th day of March, 2011.
23

24
25
26 

27 Robert D. Mitchelson, WSBA#4595
28 Attorney for Plaintiff
29
30
31
32

COPY
ORIGINAL FILED

MAR 25 2011

Scott G. Weber, Clerk, Clerk Co

COPY

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

TWO GUYS INC., a Washington Corporation,
aka FRANCHISE INFUSION, INC.

Plaintiffs,

vs.

NICK-n-WILLY'S FRANCHISE COMPANY, LLC,
and RICHARD WEIL,)

Defendants.

11 2 01246 1
NO.

**COMPLAINT
FOR RECISION, DAMAGES,
AND ATTORNEY'S FEES**

I. PARTIES/JURISDICTION

1.1 Two Guys Inc. at all times material was a Washington Corporation, registered with the State of Washington and having paid all required fees. Subsequent to their initial registration, Two Guys Inc. has filed a change of name with the Secretary of State for the State of Washington and now operates under the name of Franchise Infusion, Inc.

1.2 Nick-n-Willy's Inc. (hereafter NNW) at all times material purports to be a national franchisor offering pizza store franchises nationally to the public in general, including locations throughout the States of Washington and Oregon.

1.3 In addition to selling pizza franchises NNW has over time solicited and entered into area developer agreements with certain individuals to assist NNW in marketing their franchises to the public.

1.4 In addition to doing business in the State of Washington, at all times material, NNW registered with the Department of Financial Institutions under RCW 19.100, known as the Franchise Protection Act (FPA). As part of that act they submitted themselves to the jurisdiction of Washington Courts and consented to accept service of process under RCW 19.100.160.

1.5 Plaintiffs will be referred to as Two Guys because the transactions which are the primary subject matter of this complaint were entered into prior to the name change to Franchise Infusion Inc.

1.6 Plaintiffs allege on information and belief that Richard Weil is the chief operating officer of NNW and has personally done business in the State of Washington in relationship to NNW and has acted outside his corporate authority by aiding and abetting certain illegal franchise activities which will be outlined further in Plaintiff's complaint. He is therefore within the jurisdiction of this court.

II. FACTS

2.1 Two Guys is a Washington Corporation whose principals are Scott R. Mitchelson and Jack Gettles (hereafter Gettles and Mitchelson).

2.2 On or about March 3, 2006 Two Guys entered into what is known as an Area Developer's Agreement (ADA) with NNW. That agreement was modified with a new agreement entered into effective November 30, 2007 (Exhibit "1"). The

1 new agreement primarily added territories not granted in the March 2006
2 Agreement.

3
4 2.3 Among other things, the Agreement allowed and required Two Guys
5 and its principals to solicit potential franchisees or follow up on leads generated
6 from the corporate offices of NNW and attempt to solicit those individuals as
7 franchisees. In addition to their duties to either directly solicit franchisees or
8 assist with leads provided by the parent company, Two Guys assumed the
9 responsibility in their Operating Agreement to do certain follow up work to assist
10 the franchisees with the locating of stores, set ups and training for operations in
11 conformity with the desires of the parent company.

12
13 2.4 At all times, Two Guys and their principals, fulfilled their obligations
14 under the Operating Agreement to the best of their ability, notwithstanding
15 certain problems created by NNW as mentioned below.

16
17 2.5 As part of the Operating Agreement, NNW, has agreed to pay Two
18 Guys certain amounts of money for various services. Part of the Agreement allows
19 for the payment of commissions for each franchisee successfully acquired by the
20 efforts of Two Guys and payable once a store is up and operating. In addition,
21 NNW collects royalties from each franchisee once they are operating and those
22 royalties are to be distributed for various purposes. Part of the royalties are to be
23 repaid to Two Guys and a portion of the royalties are to be placed in an ad fund
24 to support the successful operation of operating franchisees.

25
26 2.6 NNW is now refusing to pay royalties due Two Guys and are
27 delinquent for the following months:

28	May 2010 in the amount of	\$630.34
29	June 2010 in the amount of	\$629.13
30	July 2010 in the amount of	\$614.26
31	August 2010 in the amount of	\$705.59
32	September 2010 in the amount of	\$432.63

1 October 2010 in the amount of \$342.29

2 November 2010 in the amount of \$103.00

3
4 2.7 In addition Two Guys allege on information and belief that certain
5 portions of the royalties that are specifically to be devoted to the advertising fund
6 have been diverted by company officials, particularly defendant, Weil, for uses
7 other than those they were intended for. Two Guys has repeatedly asked for an
8 accounting as to these funds from Defendant Weil which he has refused to
9 deliver.

10
11 2.8 The Operating Agreement also requires that NNW produce certain
12 other records upon requests to Two Guys and NNW has repeatedly refused to
13 timely do so.

14
15 2.9 Two Guys has recently learned that NNW has allowed their
16 registration with the State of Washington to lapse thereby making it illegal for
17 Two Guys to sell franchises in the State of Washington making it impossible to
18 fulfill their obligations under their ADA.

19
20 2.10 Both the Operating Agreement and the Franchise Agreement give
21 NNW the latitude to make choices concerning whether the franchises are to be
22 operated as what is known as a take-out store or a restaurant style store or a
23 combination. Management of NNW however has been negligent in their choice of
24 operating methods particularly in regard to machinery to be installed in the
25 restaurant style operations and has made the cost of opening and maintaining
26 such operations prohibitive when compared with the costs of opening and
27 operating competitors franchises within the areas granted to Two Guys within
28 their ADA.

29
30 2.11 Two Guys alleges on information and belief that NNW has also sold
31 at least one franchise in Two Guys' area without paying Two Guys a commission
32 and doing so while not registered under the FPA.

2.12 NNW has also apparently adopted a policy of refusing to provide leads to Two Guys as the possible franchisees in their franchise area which significantly hindered Two Guys in their ability to solicit franchises even when NNW was properly registered under the FPA.

2.13 This refusal to supply leads has also hindered Two Guys' ability to comply with their requirements under their ADA.

2.14 Two Guys has been sued by a franchisee due to acts of NNW as enumerated below and required to incur attorney's fees to defend themselves.

III. FIRST CLAIM FOR RELIEF (Breach of Contract and Rescission)

3.1 When Two Guys entered into their ADA with NNW in March 2006, they paid the sum of approximately \$180,000 for the right to operate in the areas granted to them. By failing to register under the FPA, together with the actions set out in claims II through IV, NNW has made it impossible for Two Guys to sell franchises in the Washington territories they have. Therefore the Agreement should be rescinded and Two Guys should have refunded to them all sums paid for their area development rights.

3.2 In addition to rendering it impossible for Two Guys to properly perform their ADA, NNW has refused to meet the financial requirements of the Agreement in that they failed to pay Two Guys the sum of \$3,457.24 out of their share of royalties collected by franchisees within Two Guys' development area.

3.3 As a result of the enumerated breaches Two Guys should have refunded to them their entire purchase money paid as consideration for the granting of the area development rights together with \$3,457.24 dollars in

1 damages for failure to pay the share of royalties collected by NNW and not paid to
2 Two Guys.

3
4
5 **IV. SECOND CLAIM FOR RELIEF**

6 (Unfair Deceptive Acts or Practices)

7 (Violation of RCW 19.86)

8
9 4.1 Two Guys alleges on information and belief that certain portions of
10 the royalties that had been collected from franchisees in the territories granted to
11 Two Guys which should have been earmarked and used for advertising have
12 been diverted for other uses to company officials. This is an illegal and deceptive
13 act in regard to both the franchisees and the area developers and contrary to the
14 ADA and Washington Law.

15
16 4.2 In addition to diversion of ad monies for purposes other than which
17 they were intended, NNW sold at least one franchise within Two Guys' territory
18 and refused to pay a commission on that sale or even communicate with the
19 principals of Two Guys as to what the terms and conditions of what the sale were
20 and apparently did so when they were not registered to sell franchises within the
21 State of Washington.

22
23 4.3 Two Guys should have damages for the franchise fee they would
24 have earned on the sale of the franchise in question and all damages suffered by
25 Two Guys should be tripled as provided for at RCW 19.86 and the court should
26 declare this to be a per se violation of RCW 19.86 as provided for at RCW
27 19.100.190.

28
29 **V. THIRD CLAIM FOR RELIEF**

30 (Negligence)

31
32 5.1 Although the ADA and Franchise Agreements given to individual
franchises provide that NNW can make changes in their mode of operation.

1 Management of NNW has been negligent in the choices they made thereby
2 rendering it virtually impossible for new franchisees to be acquired and
3 franchisees sold in the early stages of Two Guys' sales efforts to remain
4 profitable.

5
6 5.2 In particular, they added restaurant style operations to early
7 franchises that had been assured they would be purely a take-n-bake operation
8 who were then required to install expensive pizza ovens that were both more
9 expensive than other competitors were using and less functional in allowing a
10 franchisee to economically service their customers in lieu of a take-n-bake
11 product.

12
13 5.3 As a result of these negligent choices by NNW's management,
14 virtually all of the franchisees initially opened by Two Guys have closed or are in
15 the process of closing because the cost of setting up a new franchise has now
16 risen to the point that there is no reasonable expectation of a decent return on
17 investment.

18
19 5.4 Because of these negligent choices, Two Guys have lost substantial
20 royalties that they would have been paid had NNW management made prudent
21 business decisions concerning the franchisees initially opened by Two Guys. Two
22 Guys should have all damages proven at the time of trial in regard to royalties
23 that would have been expected to have been received had the franchisees
24 operated as initially intended.

25
26 **VI. FOURTH CLAIM FOR RELIEF**

27 (Breach of Duty of Good Faith)

28
29 6.1 In addition to the claims set forth in Sections III, IV and V, NNW
30 management has been guilty of breaching their duty of good faith.

1 6.2 Washington Law in general requires honesty in fact in the
2 observance of reasonable commercial standards of fair dealing in the trade. Good
3 faith performance or enforcement of a contract emphasizes faithfulness to an
4 agreed common purpose and consistency with justified expectations of the other
5 party.
6

7 6.3 The chief operating officers and senior management of the company
8 consistently refuse to correspond with area developers and franchisees and have
9 provided no support services nor leads to ADAs for quite some time. Telephone
10 calls are not answered, emails are not responded to and complaints from
11 franchisees are met with disparaging remarks about the franchisees business
12 abilities instead of providing technical support and positive suggestions as to
13 furthering the success of various operations.
14

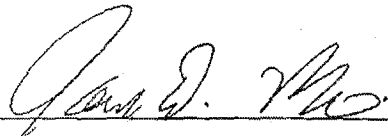
15 6.4 A duty of good faith also requires an accurate accounting from time
16 to time to area developers as to what franchisees are open or not open and
17 disclosure to ADAs about pertinent activities within or against the company that
18 should be readily be made available to ADAs. This has not been done. Examples
19 of this breach of good faith are that law suits have been filed against the
20 company that have not been disclosed to Two Guys and other ADAs making it
21 virtually impossible to honestly and effectively solicit franchisees within the areas
22 granted to Two Guys and other ADAs. As a result defendants have made it
23 impossible to fulfill their obligations any longer under thier ADA.
24

25 WHEREFORE Plaintiffs pray for judgment against the Defendants as
26 follows:
27

- 28 1. For rescission of their Area Developer Agreements and return of all
29 funds paid for area development rights;
30
31
32

2. For judgment for royalties illegally withheld by NNW together with any royalties that are withheld subsequent to the filing of this complaint;
3. For damages for royalties in an amount to be proven at trial that would likely have been earned by Two Guys had management acted prudently in their decision of how to operate franchises that had been obtained and opened by Two Guys during the time when they were party to the Area Developer Agreement;
4. For all attorney's fees and court costs allowed under RCW 19.86 or the Area Development Agreement and any other Washington Statute providing for reasonable attorney's fees and costs;
5. That all damages awarded Two Guys be trebled; and
6. For such other and further relief as to the Court seems proper.

DATED this 25th day of July, 2010.


ROBERT D. MITCHELSON, WSB# 4595
Attorney for Plaintiffs